SUPREME COURT, U.S.

No. 73-1065

FILED
APR 28
MICHAEL RODAK, JR.

# In the Supreme Court of the United States

OCTOBER TERM, 1973

---

INTERNATIONAL BUSINESS MACHINES CORPORATION,
PETITIONER

*v.*

UNITED STATES OF AMERICA and
DAVID N. EDELSTEIN, CHIEF JUDGE,
UNITED STATES DISTRICT COURT

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

LAWRENCE G. WALLACE,
*Acting Solicitor General,*

THOMAS E. KAUPER,
*Assistant Attorney General,*

HOWARD E. SHAPIRO,
JOHN B. WYSS,
*Attorneys,*
*Department of Justice,*
*Washington, D.C. 20530.*

# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Questions presented | 2 |
| Statutes involved | 2 |
| Statement | 2 |
| A. Pretrial Order No. 5 | 4 |
| B. The contempt proceedings in the district court | 7 |
| C. The contempt hearing | 10 |
| D. The district court's decision | 11 |
| E. The decision of the court of appeals | 13 |
| Argument | 15 |
| Conclusion | 28 |
| Appendix A | 29 |
| Appendix B | 32 |


## CITATIONS

Cases:


| | |
|---|---|
| *Bloom* v. *Illinois*, 391 U.S. 194 | 16 |
| *Boylan* v. *Detrio*, 187 F. 2d 375 | 20 |
| *Christensen Engineering Co.* v. *Westinghouse Air Brake Co.*, 135 Fed. 774 | 20 |
| *Dickinson* v. *Rinke*, 132 F. 2d 884 | 22 |
| *Doyle* v. *London Guarantee Co.*, 204 U.S. 599 | 13, 21, 22, 24, 25, 26 |
| *Fireman's Fund Ins. Co.* v. *Myers*, 439 F. 2d 834 | 22 |

Cases—Continued Page

*First Security Nat. Bank and Trust Co. of Lexington* v. *United States*, 382 U.S. 34 ..... 27
*Fox* v. *Capital Co.*, 299 U.S. 105 ..... 8, 13, 15, 21, 22, 23, 24, 25, 26
*Gompers* v. *Bucks Stove and Range Co.*, 221 U.S. 418 ..... 12, 16
*Hickman* v. *Taylor*, 329 U.S. 495, affirming 153 F. 2d 212 ..... 7
*Hodgson* v. *Mahoney*, 460 F. 2d 326, certiorari denied, 409 U.S. 1039 ..... 22
*Hughes* v. *Sharp*, 476 F. 2d 975 ..... 22
*International Business Machines Corp.* v. *United States*, 471 F. 2d 507 ..... 6-7
*International Business Machines Corp.* v. *United States*, 480 F. 2d 293 ..... 3, 7
*McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187 ..... 16
*McKee Glass Co.* v. *H. C. Fry Glass Co.*, 248 Fed. 125 ..... 20
*NAACP* v. *New York*, 413 U.S. 345 ..... 26
*National Labor Relations Board* v. *Lynair, Inc.*, 380 F. 2d 286 ..... 20
*National Labor Relations Board* v. *Teamsters Local 282*, 438 F. 2d 100 ..... 20
*National Labor Relations Board* v. *Teamsters Local 676*, 450 F. 2d 413 ..... 20
*New York Telephone Co.* v. *Communications Workers*, 445 F. 2d 39 ..... 22-23, 24
*Penfield Co. of California* v. *Securities and Exchange Commission*, 330 U.S. 585 ..... 24
*Reisman* v. *Caplin*, 375 U.S. 440 ..... 22, 23

Cases—Continued Page

*Securities and Exchange Commission* v. *Naftalin*, 460 F. 2d 471 ..... 22
*Shenandoah Valley Broadcasting, Inc.* v. *American Society of Composers, Authors & Publishers*, 375 U.S. 39 ..... 27
*Shillitani* v. *United States*, 384 U.S. 364 ..... 16
*Sibbach* v. *Wilson & Co.*, 312 U.S. 1 ..... 22, 23
*Southern Railway Co.* v. *Lanham*, 403 F. 2d 119 ..... 22
*Terminal Railroad Association* v. *United States*, 266 U.S. 17 ..... 27
*Tidewater Oil Co.* v. *United States*, 409 U.S. 151 ..... 25, 26, 28
*United States* v. *Aberbach*, 165 F. 2d 713 ..... 20
*United States* v. *American Society of Composers, Authors & Publishers*, 341 F. 2d 1003 ..... 27
*United States* v. *California Cooperative Canneries*, 279 U.S. 553 ..... 26
*United States* v. *Griffin*, 303 U.S. 226 ..... 26
*United States* v. *Navajo Freight Lines, Inc.*, 339 F. Supp. 554, dismissed *sub nom. Garrett Freightlines, Inc.* v. *United States*, 405 U.S. 1035 ..... 27
*United States* v. *Procter & Gamble*, 356 U.S. 677 ..... 15
*United States* v. *Ross*, 243 F. Supp. 496 ..... 16
*United States* v. *United Mine Workers*, 330 U.S. 258 ..... 16, 19, 20, 21, 24
*Vincent* v. *Teamsters Local 294*, 424 F. 2d 124 ..... 22

Statutes: Page

Expediting Act, Section 2, 32 Stat. 823, as amended, 15 U.S.C. 29 ..... 2, 13, 15, 26, 27
Sherman Act, Section 2, 26 Stat. 209, as amended, 15 U.S.C. 2 ..... 5
18 U.S.C. 401 ..... 16, 18
18 U.S.C. 402 ..... 16
28 U.S.C. 1291 ..... 2, 13
28 U.S.C. 1651(a) ..... 3, 26
28 U.S.C. 2101(b) ..... 3

Miscellaneous:

Dobbs, *Contempt of Court: a Survey*, 56 Cornell L. Rev. 183 (1971) ..... 16
Rule 13, Rules of the Supreme Court ..... 3
Rule 41(b), Federal Rules of Appellate Procedure ..... 14
Rule 42, Federal Rules of Criminal Procedure ..... 16
Rule 14, Civil Rules of United States District Court for the Southern District of New York ..... 8, 9

# In the Supreme Court of the United States

OCTOBER TERM, 1973

---

No. 73-1065

INTERNATIONAL BUSINESS MACHINES CORPORATION, PETITIONER

*v.*

UNITED STATES OF AMERICA and
DAVID N. EDELSTEIN, CHIEF JUDGE,
UNITED STATES DISTRICT COURT

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

### OPINIONS BELOW

The opinion of the court of appeals (II IBM App.[1] I, pp. 158a-193a) and the district court's opinion (II

[1] References to "II IBM App." are to the Appendix filed by petitioner in Nos. 73-1064 and 73-1065. References to "IBM App." are to the Appendix filed by petitioner last June with the pending "all writs" application in No. 72-1661. See n. 2, *infra*.

IBM App. H, pp. 141a-157a) and Adjudication of Contempt (II IBM App. G, pp. 139a-140a) are not yet officially reported.

## QUESTIONS PRESENTED

1. Whether, in an on-going government civil antitrust case, an adjudication that a corporation is in *civil* contempt because it failed to produce documents in violation of a pretrial order, is nevertheless *criminal* in nature because it imposes a contingent, coercive fine of five percent of the corporation's daily earnings for each day of continued non-compliance.

2. Whether, if the contempt adjudication is civil, it is a non-appealable interlocutory order.

3. Whether, if the contempt adjudication is civil, this Court has exclusive jurisdiction over any appeal from it under the Expediting Act, 15 U.S.C. 29.

## STATUTES INVOLVED

Section 2 of the Expediting Act, 32 Stat. 823, as amended, 15 U.S.C. 29, and Section 1291 of Title 28, 28 U.S.C. 1291, are set forth following page 33 of the petition.

## STATEMENT

This petition seeks review of a judgment of the court of appeals that it lacked jurisdiction to review the district court's adjudication of civil contempt against International Business Machines Corporation

(IBM) for failure to comply with a pretrial discovery order in this government civil antitrust action.[2]

The discovery order, Pretrial Order No. 5, with which IBM has refused to comply, directs IBM to produce to the government certain documents which IBM had previously disclosed to a third party, Control Data Corporation (CDC), in the course of discovery in CDC's antitrust action against IBM in the United States District Court for the District of Minnesota. IBM claimed that the documents had been

---

[2] The contempt order as well as the underlying pretrial discovery order are the subject of six separate appeals and petitions presently before this Court, including the instant petition for certiorari.

No. 72-1173 is a direct appeal by IBM to this Court from the pretrial discovery order.

No. 72-1661 is a petition by IBM to this Court for an extraordinary writ under 28 U.S.C. 1651(a), to review the discovery order.

In No. 72-1662, IBM has petitioned for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in *International Business Machines Corp.* v. *United States*, 480 F.2d 293 (*en banc*). The court of appeals there held that it lacked jurisdiction to review, either by appeal or by mandamus, the pretrial discovery order.

In No. 73-1064, IBM seeks review on extraordinary writ of both the adjudication of contempt and the merits of the discovery order.

In No. 73-1066, Cravath, Swaine & Moore, counsel for IBM throughout the proceedings in this antitrust suit, has filed a direct appeal challenging the district court's rejection of its attempted intervention in the contempt proceedings against IBM.

IBM did not, within the time prescribed by 28 U.S.C. 2101(b), file a notice of direct appeal to this Court from the adjudication of contempt and therefore has not docketed an appeal therefrom under this Court's Rule 13.

inadvertently produced to CDC and were still protected from discovery by the corporate attorney-client and work-product privileges. In the instant case, the district court ruled, however, that IBM waived its claims of privilege by delivering the documents to CDC in CDC's suit, and ordered IBM to deliver those documents to the government in this case.

### A. Pretrial Order No. 5

The history of the proceedings surrounding the entry of Pretrial Order No. 5 is fully set forth in the United States' Motion to Dismiss or Affirm filed in No. 72-1173 (see note 2, *supra*). During the initial stages of discovery in CDC's private antitrust action against IBM in Minnesota,[3] IBM turned over to CDC a large number of documents, which IBM had previously screened for privilege. CDC then selected out documents from those produced for microfilm reproduction. However, before they were microfilmed by CDC, IBM insisted that the selected documents be reviewed again for privilege by an IBM employee, a so-called "interceptor". In response to CDC's complaint regarding the slow pace of production, Judge Neville, on November 2, 1970, ordered IBM to remove the interceptor.[4]

---

[3] CDC's action was filed in December 1968. Six other private treble damage actions against IBM were subsequently commenced and were consolidated, for pretrial discovery purposes, from time to time, with the *CDC* lawsuit in the district court in Minnesota.

[4] Judge Neville did not enter any order at that time declaring that IBM retained the right to claim that documents de-

The United States had filed the present action in the United States District Court for the Southern District of New York on January 17, 1969, not long after the CDC action began. The complaint charged IBM with attempted and actual monopolization of the market for general purpose digital computers, in violation of Section 2 of the Sherman Act, 15 U.S.C. 2. While discovery was going forward in the *CDC* case, the government and IBM sought ways to eliminate the heavy burden on IBM of massive and duplicative discovery. They ultimately agreed that the government would receive microfilms of the documents that had been turned over to CDC and select-

---

livered to CDC were nevertheless privileged. He did indicate that, if he removed the interceptor, he might permit the parties to claim that documents produced were privileged, before they were introduced in evidence at trial or used in deposition proceedings. IBM's counsel has characterized Judge Neville's November 1970 ruling as follows: "*While the Court did not explicitly rule on whether inadvertent production would constitute a waiver*, the tone of what was said was that it would not" (IBM App. O, p. 117a, emphasis added).

Subsequently, on April 21, 1971, when the claim of privilege was again made to Judge Neville, he expressly ruled that IBM had in fact waived the privilege (IBM App. B, pp. 10a-11a).

One year later, on April 18, 1972, some eleven days after the government had moved in the court below for production of the documents previously delivered to CDC, Judge Neville ruled in the *CDC* case that his waiver ruling of April 1971 was erroneous. He stated that although his remarks of November 1970 "may not be crystal clear," he intended to rule that as to "each party the privilege as to any documents henceforth would not be deemed waived if reasonable effort of preinspection were to be made * * *" (IBM App. C, p. 16a).

ed by it for microfilming, from which IBM would excise allegedly privileged documents which it claimed to have disclosed inadvertently to CDC.

As government counsel began examining the material delivered by IBM, it became apparent that substantial quantities of material had been excised for privilege. On April 7, 1972, the government moved in the district court (Edelstein, Ch. J.) to compel production of approximately 1,200 allegedly privileged documents which had been produced by IBM to CDC in the Minnesota litigation, but which were excised from the microfilm delivered to the government. The matter was fully argued on May 12, 1972. IBM was represented by its present counsel Cravath, Swaine & Moore (Cravath). That firm did not attempt to intervene in its own behalf to assert its subsequently claimed (see pp. 10, 13-15, *infra*) work-product privilege.

The district court rejected IBM's claim of inadvertent waiver on September 12, 1972, and after further hearings, on September 26, 1972, entered Pretrial Order No. 5 directing production of the documents.[5] The order became final after further argument on October 5, 1972. IBM appealed to, and applied for extraordinary relief from, the court of appeals. That court stayed Pretrial Order No. 5. A divided panel held that it had jurisdiction to review the order, and directed that it be vacated. *International Business*

[5] A motion by the government for production of a further group of documents whose claimed privileged status has allegedly been waived is pending in the district court.

*Machines Corp.* v. *United States*, 471 F.2d 507 (IBM App. K). After rehearing *en banc*, however, the court (by a vote of 4 to 2), on May 8, 1973, held that it had no jurisdiction, either on appeal or by petition for a writ of mandamus, to review Pretrial Order No. 5. *International Business Machines Corp.* v. *United States*, 480 F.2d 293 (IBM App. L). IBM petitioned for a writ of certiorari and for extraordinary writs, and also docketed a direct appeal from Pretrial Order No. 5 (see n. 2, *supra*).

**B. The Contempt Proceedings in the District Court**

On June 13, 1973, this Court denied IBM's application for a further stay of Pretrial Order No. 5. Prior to the initiation of any contempt proceedings the parties then advised each other and the district court of their positions, and of their views as to the appealability of any contempt sanctions.

By letter of June 15, 1973 (Appendix A, *infra*), a senior member of Cravath (Mr. Bromley) respectfully advised the trial court that he had possession of the documents, had concluded that IBM would be governed by its counsel's decision respecting them, and that he was not required by law to turn them over to the government. Citing *Hickman v. Taylor*, 329 U.S. 495, a criminal contempt case (see 153 F.2d 212, 214 (C.A. 3)), he requested that counsel be placed in contempt; he stated that this was "the only way to obtain appellate review" (App. A, *infra*, pp. 30-31).

On June 20, 1973, the government responded by letter (Appendix B, *infra*). It stated that in the

event of continued defiance of the court's order by IBM, the most appropriate sanction would be an order holding the defendant, IBM, in civil contempt. IBM, rather than any individual, was the appropriate respondent because the conduct in issue was that of the corporation through its agents. The government recommended a contingent and coercive civil sanction equal to five percent of IBM's daily earnings for each day of continued non-compliance beyond the stated time for delivery of the documents. The government also indicated that it was open to the court to find IBM in criminal contempt. The government's letter, citing *Fox* v. *Capital Co.*, 299 U.S. 105, also advised, contrary to a statement in the government's expedited opposition to IBM's motion for a stay in this Court, that there is a distinction, not previously adverted to by the parties, between the appealability of civil and criminal contempt proceedings, but that the question of appealability should not "enter into this Court's determination of an appropriate sanction. Rather * * * the sanction should turn on the policies of law to be vindicated" (App. B, *infra*, p. 38).

On June 25, 1973, on a petition by the United States under Local Rule 14 governing civil contempt (II IBM App. J), the district court issued an order directing IBM to show cause at a hearing on June 28, 1973, why it should not be found in civil contempt (II IBM App. A). At the hearing on June 28, 1973, Mr. Rifkind, counsel for IBM and Cravath, stated that in order to provide a vehicle for appeal of

Pretrial Order No. 5 the court should, instead of finding IBM guilty of contempt, find its counsel, Mr. Bromley of Cravath, guilty of a civil contempt and impose a token penalty (II IBM App. B, p. 29a).[6] He emphasized that the contempt was "not a contumacious one" but was intended to provide a vehicle for review (*id.* at 30a). IBM also filed a response to the order to show cause indicating that if its proposal was unacceptable, "then Cravath, and IBM, pursuant to [Local Rule 14], would and hereby do put in issue their 'alleged misconduct' and 'the damages thereby occasioned'."

In the light of IBM's admitted non-compliance and request for a hearing under Local Rule 14, the district court on July 3, 1973, entered an order providing for a hearing "limited to the issues of the fine and damages to be assessed against defendant for its alleged contempt of this court's order, Pretrial Order No. 5." The district court noted that IBM had not complied with the terms of Pretrial Order No. 5 and that on the return date of the order to show cause, June 28, 1973, IBM had not controverted the facts alleged in the government's motion papers. The hearing was set for July 16, 1973 (II IBM App. C).[7]

---

[6] With respect to the token penalty, Mr. Rifkind stated:

> "I suggest $100 because the question can be resolved in the Appellate Courts just as well with a $100 fine as with a million dollar fine. Impose a penalty of $100 a day until he purges himself of the contempt and make the penalty not applicable pending appeal and its diligent prosecution" [II IBM App. B, p. 29a].

[7] On July 10, 1973, this order was modified by adjourning the question of damages claimed by the government to result

### C. The Contempt Hearing

On July 11, 1973, IBM filed a notice that on July 16, 1973, it would present a "Motion for Entry of a Plainly Appealable Contempt Order if an Order of Contempt is to be Made" (II IBM App. K). One hour before the opening of the hearing on July 16, 1973, Cravath attempted to intervene as of right on its own behalf in the contempt proceeding (II IBM App. L). The district court ruled, however, that since it had not had an opportunity to review the intervention request, that application would not be heard (II IBM App. F, p. 103a). The court then proceeded to hear first the government's claim of civil contempt, and thereafter IBM's motion for entry of an immediately appealable order.

IBM's counsel (Mr. Rifkind), in his opening statement, declared that neither IBM nor its attorneys were defiant of the lawful orders of the court. If the court was willing to enter an appealable contempt order, then IBM would forego trial on the civil contempt allegation. If the court was not disposed to accept this condition, then IBM and its attorneys insisted upon a trial on "everything", including whether Pretrial Order No. 5 was a lawful order (II IBM App. F, pp. 115a-116a). IBM's counsel expressly conceded on the record, however, that IBM had not com-

---

from the alleged contempt, pending completion of discovery on the damage issue. The hearing previously ordered, with this modification, was otherwise to go forward on the scheduled date, July 16, 1973 (II IBM App. E).

plied with Pretrial Order No. 5 (II IBM App. F, p. 131a).[8]

The government introduced, as an exhibit bearing on the amount of the coercive fine necessary, IBM's Annual Report and portions of an affidavit explaining, on the basis of that report, IBM's annual revenues and earnings. On IBM's objection, the trial court excluded documents which the government claimed demonstrated the delay in its discovery program resulting from noncompliance with Pretrial Order No. 5. The court agreed with IBM's counsel that this issue was relevant to the postponed damage question (see n. 7, *supra*), not the issue being heard (II IBM App. F, pp. 121a-129a).

**D. The District Court's Decision**

On August 1, 1973, the district court entered an opinion, findings of fact and conclusions of law, and an order adjudicating IBM in civil contempt (II IBM App. G, H). It imposed a contingent and coercive fine of $150,000 per day, to begin running from August 3, 1973, for each day of continued noncompliance with Pretrial Order No. 5. The court's opinion carefully reviewed the history of the proceedings. It held that there were no issues of fact to be tried concerning IBM's alleged misconduct because IBM

---

[8] In its memorandum of July 11, 1973, IBM disputed the court's finding in its July 3rd order that "defendant did not controvert the facts alleged in plaintiff's motion papers." However, it conceded that the "only uncontroverted fact of significance was that IBM's attorneys had not produced some of the documents covered by Pretrial Order No. 5 to the Department" (Memorandum for IBM and its Attorneys filed July 11, 1973, p. 5).

had admitted all the facts necessary for a determination of the fact of contempt. Nowhere had IBM denied that it had failed to comply with Pretrial Order No. 5, that that order was in full force and effect, and that IBM had the power to comply with it.

The court then reviewed the authorities governing civil and criminal contempt. It held that sanctions should be imposed solely to coerce the defendant to do what it had refused to do, and should be contingent in nature. It concluded that, under *Gompers* v. *Bucks Stove and Range Co.*, 221 U.S. 418, and subsequent authorities, such a remedial sanction, which provides an opportunity to the contemnor to purge itself by compliance, is civil in nature.

As to IBM's contention that the sanction should run against Cravath in order to provide an immediate vehicle for interlocutory appeal, the court ruled that appealability was not a proper consideration for it. It was limited to framing "an order which it believes to be proper in the circumstances of the case before it" (II IBM App. H, p. 148a). Pretrial Order No. 5 runs against IBM, not its counsel, and counsel's possession of the documents in issue, the court held, cannot absolve the corporation of its duty.

Finally, from IBM's Annual Report, the court found that the corporation's net earnings for 1972 exceeded $1.2 billion and that its stockholders' equity amounted to $7.5 billion. The court concluded, therefore, that the minimum amount sufficient to compel a firm of such strength and resources to comply was $150,000 per day (II IBM App. H, p. 150a).

### E. The Decision of the Court of Appeals

IBM sought review of the adjudication of contempt and the imposition of the fine, both on appeal and by extraordinary writ, in the court of appeals. Additionally, Cravath and IBM filed an appeal under 28 U.S.C. 1291 asserting that the district court had erroneously denied Cravath's petition to intervene in its own behalf as a party in the civil contempt hearing, for the purpose of asserting an attorney's work-product privilege against production of some of the documents. They prayed that the district court be required to impose civil contempt sanctions upon Cravath or one of its members, Mr. Bromley, to provide appellate review of the underlying Pretrial Order No. 5. The court of appeals stayed the contempt order pending its review.

On December 17, 1973, a divided panel of the court of appeals issued an opinion dismissing the appeals and denying the petition for an extraordinary writ (II IBM App. I). The court held that the contempt order was civil in character, not criminal as IBM had contended; that orders of civil contempt are interlocutory and may not be challenged on appeal until the entry of final judgment under *Fox* v. *Capital Co.*, 299 U.S. 105, 107, and *Doyle* v. *London Guarantee Co.*, 204 U.S. 599, 608; and that even if the order were considered final for purposes of review, the Expediting Act, 15 U.S.C. 29, deprives the courts of appeals of jurisdiction to review such an order in a government civil antitrust action. The court of appeals also rejected IBM's contentions that the gov-

ernment was estopped from arguing nonappealability of the contempt order [9] and that manifest errors in the proceedings in the district court require the contempt order to be vacated. Finally, the court held that the question of Cravath's attempted intervention in the contempt proceedings was not properly before it, in that the district court had never acted upon the untimely filed application to intervene.

In a dissenting opinion (II IBM App. I, pp. 173a-193a), Judge Timbers expressed the view that the contempt adjudication was criminal in nature and therefore reviewable by the court of appeals. He would have set aside the contempt order, vacated the production order, and remanded the case to the district court for a ruling on the merits of IBM's underlying claims of privilege. In addition, he viewed the question of Cravath's attempted intervention as properly before the court and concluded that Cravath had been erroneously excluded from participation in the contempt proceedings.

The court of appeals subsequently stayed issuance of its mandate, pursuant to Rule 41(b), Fed. R. App. P., pending disposition of the present petition for certiorari by this Court.

Meanwhile, on January 4, 1974, the district court entered an opinion denying without prejudice Crav-

---

[9] IBM alleged that the government had attempted to mislead IBM by previous statements that the only way to obtain review of Pretrial Order No. 5 before the end of the case was for IBM or its representative to risk contempt.

ath's motion to intervene, for failure to comply with local rules (Supp. Memorandum for Cravath and IBM, App. A). On January 21, 1974, Cravath moved to intervene as of right, *nunc pro tunc*, and IBM moved to vacate the adjudication of contempt. Both motions were denied by Judge Edelstein in an opinion entered March 6, 1974 (Supp. J. S., No. 73-1066, App. A).

## ARGUMENT

The history of Pre-trial Order No. 5 demonstrates why the rule against interlocutory appeals in government antitrust cases is sound and why the discovery in the present important and complex action should not be further delayed. The contempt order was civil, not criminal. It is therefore not final for purposes of review. *Fox* v. *Capital Co.*, 299 U.S. 105. Even if the rule of *Fox* were to be reconsidered this could be done only on a direct appeal of the contempt adjudication [10] to this Court under the Expediting Act, 15 U.S.C. 29, because this is a government civil antitrust suit. IBM's time for notice of such an appeal has long expired.[11] The decision of the court of appeals was correct and presents no issue warranting review by this Court.

---

[10] Cf. *United States* v. *Procter & Gamble*, 356 U.S. 677, 680.

[11] IBM timely filed and docketed a direct appeal from Pretrial Order No. 5, see n. 2, *supra*.

1. The district court's contempt adjudication was civil, not criminal in nature. "Criminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both" (*Bloom* v. *Illinois*, 391 U.S. 194, 201) standing apart from the underlying litigation in which the order disobeyed was entered. It is governed by 18 U.S.C. 401 and 402 and Rule 42, Fed. R. Crim.P. The requirements of notice, burden of proof, penalty, and the right to jury trial are characteristic of criminal proceedings. *Bloom* v. *Illinois*, *supra*, 391 U.S. at 205. The penalty imposed is public rather than private, since it is intended to "vindicate" the authority of the court by punishing for completed acts of misconduct with a fixed and certain penalty. See, *e.g.*, *Gompers* v. *Bucks Stove and Range Co.*, 221 U.S. 418; *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187; *United States* v. *United Mine Workers*, 330 U.S. 258; *United States* v. *Ross*, 243 F. Supp. 496 (S.D.N.Y.). See, also, Dobbs, *Contempt of Court: a Survey*, 56 Cornell L. Rev. 183, 235-245 (1971).

Civil contempt, on the other hand, is intended, not to punish for completed acts of contumacy, but to compel obedience to court orders. The defendant's intent is irrelevant (*McComb*, *supra*, 336 U.S. at 191), and the court's power to enforce compliance is inherent rather than dependent on statute or rule (*Shillitani* v. *United States*, 384 U.S. 364, 370). As the court of appeals observed (II IBM App. I, p. 163a):

> The hallmark of civil contempt is that the sanction imposed is only contingent and coercive. *Shillitani* v. *United States*, 384 U.S. 364, 370 (1966); *Penfield Co.* v. *SEC*, 330 U.S. 585, 590 (1947); *United States* v. *UMW*, 330 U.S. at 303; *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. at 442. See *Dobbs*, 56 Cornell L. Rev. at 237. Civil contempt, moreover, has a remedial purpose—compelling obedience to an order of the court for the purpose of enforcing the other party's rights, or obtaining other relief for the opposing party. *Nye* v. *United States*, 313 U.S. 33, 42 (1941); *McCrone* v. *United States*, 307 U.S. 61, 64 (1939); *Gompers v. Bucks Stove & Range Co.*, 221 U.S. at 441. The distinction between civil and criminal contempt is, in short, "usually based on the purpose for which the contempt sentence is meted out." *Dobbs*, 56 Cornell L. Rev. at 235.

The contingent and coercive civil purpose of the adjudication here is plain from the proceedings. The district court's order to show cause specifically stated that the matter in issue was whether IBM should be adjudicated in civil contempt of Pretrial Order No. 5 (II IBM App. A, p. 1a). The proceedings have been conducted under Local Rule 14, which governs civil contempt proceedings, including cases arising from disobedience of discovery orders.[12] IBM made no request for a jury trial. The government did not seek imposition of a definitive punitive sanction and it litigated the claim of civil contempt in its capacity

[12] Both the government, in its petition, and IBM had requested the court to proceed under Rule 14.

as plaintiff in a civil antitrust suit, not as criminal prosecutor under 18 U.S.C. 401. As stated by the court of appeals (II IBM App. I, p. 163a):

> The order, dated August 1, 1973, makes it clear that the fine is for each day that IBM "fails to comply with Pretrial Order No. 5" and that IBM is "entitled to purge itself of this contempt at any time" by compliance with the discovery order. The order of July 10, 1973, requiring that the hearing proceed in respect to the possibility of contempt, clearly states that the hearing is to be "on the issue of a coercive fine. . . ." Thus the order was both coercive and contingent, indicating a civil rather than criminal contempt.

IBM's present argument (Pet. 16), that the severity of the penalty imposed—a contingent fine of $150,000 per day—indicates that the contempt order is criminal rather than civil, was considered and properly rejected by the court below. While the fine appears large in absolute terms, it represents less than 5 percent of IBM's daily earnings.[13] The court of appeals properly recognized that the magnitude of the fine imposed cannot "turn a civil contempt into a criminal one, any more than the sending of an individual to jail turns a civil contempt into criminal contempt. In neither case does the severity of the penalty change the nature of the contempt" (II IBM App. I, p. 164a, citations omitted).

---

[13] As the court of appeals noted, "the same percentage of earnings fine against one with a salary of $50,000 would be less than $7 per day" (II IBM App. I, p. 164a, n. 2).

The court of appeals also properly rejected IBM's claim (Pet. 16-18) that the district court's failure explicitly to weigh "the character and magnitude of the harm threatened by continued contumacy * * *" (*United States* v. *United Mine Workers*, 330 U.S. 258, 304) compels a finding of criminal contempt. IBM itself objected to the government's offer of evidence concerning the harm to it from IBM's continued refusal to comply with Pretrial Order No. 5 and this objection was sustained (II IBM App. F, pp. 123a-129a). "Thus, even if IBM had a right to consideration by the court of the harm to the Government, it waived that right by objecting to the evidence of it" (II IBM App. I, pp. 164a-165a).

Second, even if the language of *United Mine Workers* were read to require an explicit finding as to harm in all coercive, civil contempts, the failure to make such a finding would not convert a contempt order—which is styled as civil by the judge imposing it, which has a clearly civil purpose, and which was imposed only after consideration of questions relevant only to civil contempt—into an order of criminal contempt. Such failure "at worst would only go to the amount of the coercive fine, not to the merits of the civil contempt itself" (II IBM App. I, p. 166a).[14]

---

[14] The court of appeals observed further, "In light of IBM's often stated intention that it will comply with a definitive ruling on the Pretrial Order, rather than stand in contempt, no matter how nominal the fine, there would be little point in delaying the process by remanding for reconsideration of the amount of the fine" (II IBM App. I, p. 166a).

Finally, the court of appeals correctly held that the language of *United Mine Workers* does not impose an inflexible requirement that a court must consider the harm of continued contempt in fashioning a civil, coercive contempt order. IBM has cited no case where a civil coercive contempt was voided for failure to meet this "requirement",[15] nor do civil coercive contempts always involve such findings. See, *e.g.*, *National Labor Relations Board* v. *Teamsters Local 282*, 438 F. 2d 100 (C.A. 2); *National Labor Relations Board* v. *Teamsters Local 676*, 450 F. 2d 413 (C.A. 3); *National Labor Relations Board* v. *Lynair, Inc.*, 380 F. 2d 286 (C.A. 6).[16] In the circumstances of the present case, it would be "impossible to determine what harm is being suffered here by failure to provide this material for discovery" and to attempt to do so "would involve a prejudgment of the case on the merits" (II IBM App. I, p. 166a). Obviously,

---

[15] The cases cited by IBM (Pet. 18, n. *) supporting the need for an inquiry into harm all relate to compensatory fines, not coercive fines. See *Boylan* v. *Detrio*, 187 F. 2d 375 (C.A. 5); *United States* v. *Aberbach*, 165 F. 2d 713 (C.A. 2); *Christensen Engineering Co.* v. *Westinghouse Air Brake Co.*, 135 Fed. 774 (C.A. 2); *McKee Glass Co.* v. *H.C. Fry Glass Co.*, 248 Fed. 125 (C.A. 3).

[16] It is difficult to see how the presence or absence of an explicit finding with respect to "the character and magnitude of the harm threatned by continued contumacy" would have any effect on the traditional sanction for civil coercive contempt of imprisonment of an individual for each day of continued noncompliance. Once it is determined that imprisonment is required to bring about compliance, the magnitude of threatened harm becomes irrelevant.

the government cannot conduct a mini-trial on the merits of its monopolization charge in order to achieve compliance with a pretrial discovery order. As the court of appeals held, *United Mine Workers* requires only that (*ibid.*):

> the coercive fine be reasonably set in relation to the facts, that it not be arbitrary. Judge Edelstein's memorandum [II IBM App. H] is evidence that his decision was reasoned and that he gave consideration to the various factors which led to this particular fine—the ability of IBM to meet these payments without undue hardship and the imposition of a fine stiff enough to bring about expeditious compliance.

2. Since the contempt sanction is civil, in the circumstances of this case the adjudication is an interlocutory order which, under this Court's decisions, may not be challenged on appeal until the entry of final judgment. In *Doyle* v. *London Guarantee Co.*, 204 U.S. 599, the defendants in a civil action refused to obey an order to produce books and records. The trial court held them in civil contempt by imposing a contingent fine and jail sentence of 60 days if they failed to produce by a specified date. This Court held that this sanction was civil and interlocutory, and that the circuit courts of appeals therefore had no statutory jurisdiction to review it in advance of the final decree in the case in which the order was made.

Subsequently, in *Fox* v. *Capital Co.*, 299 U.S. 105, 107, the Court stated that the "rule is settled in this Court that except in connection with an appeal from

a final judgment or decree, a party to a suit may not review upon appeal an order fining or imprisoning him for the commission of a civil contempt." *Fox* involved civil contempts of orders entered in a supplementary proceeding under the New York Civil Practice Act, "a summary substitute for a suit in equity by a creditor for the discovery of assets" (*ibid.*). This Court concluded that such a supplementary proceeding may continue until its aim has been achieved or it expires. It held that the civil contempt sanctions, which included a fine and imprisonment until payment of the fine, were not final and were, therefore, not appealable.[17]

IBM argues (Pet. 19-25) that the principle of *Fox* v. *Capital Co.* is not applicable in the present case, citing *Reisman* v. *Caplin*, 375 U.S. 440; *Sibbach* v. *Wilson & Co.*, 312 U.S. 1; and *New York Telephone*

---

[17] The principle of *Fox* and *London Guarantee* remains in full force. It has never been modified by any statute conferring jurisdiction over adjudications of civil contempt and continues to be followed in decisions of the courts of appeals. See, *e.g.*, *Vincent* v. *Teamsters Local 294*, 424 F. 2d 124, 127-128 (C.A. 2); *Dickinson* v. *Rinke*, 132 F. 2d 884, 885 (C.A. 2); *Hughes* v. *Sharp*, 476 F. 2d 975 (C.A. 9); *Hodgson* v. *Mahoney*, 460 F. 2d 326, 327 (C.A. 1), certiorari denied, 409 U.S. 1039; *Securities and Exchange Commission* v. *Naftalin*, 460 F. 2d 471, 475 (C.A. 8); *Fireman's Fund Ins. Co.* v. *Myers*, 439 F. 2d 834, 838 (C.A. 3); *Southern Railway Co.* v. *Lanham*, 403 F. 2d 119, 124 (C.A. 5).

IBM's present argument (Pet. 12-14, 24) that the principle of *Fox* is limited by the facts of that case ignores the fact that the rationale of *Fox* was based squarely on *London Guarantee*, which involved factual circumstances almost identical to those present here.

*Co.* v. *Communications Workers*, 445 F. 2d 39 (C.A. 2). *Reisman*, however, did not involve an interlocutory adjudication of contempt at all. As the court of appeals observed (II IBM App. I, pp. 167a-168a, footnotes omitted):

> *Reisman* v. [*Caplin*], *supra*, is simply not applicable to this case. There the claim was that the IRS's summons machinery should be enjoined as to plaintiff because the summons sought material which incriminated him and also unlawfully appropriated the attorney's work product. The Supreme Court denied the injunction, because there was already adequate judicial review of the IRS's summons in a contempt proceeding, which was the only means to enforce the summons. Indeed, *Reisman* is contrary to IBM's case, because it stands for the adequacy of the judicial review in a contempt proceeding itself. In passing, the Court noted that a finding of civil or criminal contempt enforcing the summons would be appealable. This is so * * * because it would not be interlocutory. It would be the final order of the only proceeding before the court, which is certainly not the case here.

In *Sibbach* v. *Wilson & Co.*, without reference to the rule in *Fox* v. *Capital Co.*, this Court reviewed on petition for writ of certiorari a court of appeals decision affirming an adjudication of civil contempt for refusal by the plaintiff in a tort action to submit to a physical examination. The issue of the appealability of a civil contempt order was never raised. There is no indication that the Court intended to modify or overrule *Fox*, and *Fox* was subsequently

cited in *Penfield Co. of California* v. *Securities and Exchange Commission*, 330 U.S. 585, 590. And Mr. Justice Rutledge's dissenting opinion in *United States* v. *United Mine Workers*, 330 U.S. 258, quoted *Fox* as defining the "largest present difference" between appeals in civil and criminal contempts. 330 U.S. at 369 n. 35.[18] That difference remained unmodified by the 1948 revision of the Judicial Code.

The rule of *London Guarantee* and *Fox* v. *Capital Co.* is not an arid procedural technicality. It rests upon the unchanged policy of Congress to limit interlocutory appeals in civil cases to specifically defined categories. Particularly inappropriate for interlocutory appeals are discovery orders at the pretrial stages of litigation. The arguments urged here by

---

[18] The Second Circuit's decision in *New York Telephone Co.* v. *Communications Workers, supra*, is also inapplicable. That case arose out of alleged disobedience by a labor union of a temporary restraining order against a particular work stoppage. The order was extended over a period long after the initial dispute was over, and the union was subsequently adjudged in civil contempt. On a challenge to the union's appeal for lack of finality, the court of appeals concluded that the main action in which the order had been issued had effectively been terminated and therefore that the civil contempt adjudication being appealed was no longer interlocutory. The court stated: "* * * we doubt that anything further remains of the main action unless the district court grants leave to replead. Accordingly, our intervention by way of appeal runs no risk of disrupting the orderly course of proceedings below." 445 F. 2d at 45. That is not the case here, since the main action remains far from final adjudication and is being delayed by petitioner's noncompliance with the trial court's discovery order.

IBM to undercut the *Fox* principle, however, would result in a right of appeal for *all* pretrial discovery orders. As the court below concluded: "* * * the possibility of abuse and injustice would actually be increased by opening wide the gates of review to discovery orders, than by leaving the determination to the wise discretion of experienced trial judges" (II IBM App. I, p. 170a, footnote omitted). The numerous, complex, and time-consuming proceedings, arising out of a discovery order entered more than one year earlier, demonstrate the reasons for the requirement that only final judgments are appealable in a government antitrust case. *Tidewater Oil Co.* v. *United States*, 409 U.S. 151.[19]

---

[19] IBM complains of the government's "change of position" concerning the appealability of a civil contempt adjudication. Government appellate counsel erroneously overlooked *Fox* v. *Capital* and *Doyle* v. *London Guarantee*, *supra*, in arguing that "contempt" would be appealable to this Court. These cases should have been cited by the government in the earlier proceedings, and in opposition to IBM's application to this Court for a stay of Pretrial Order No. 5, because they reinforce the government's unchanged contention that under the rule of finality, pretrial discovery orders are not appealable until final judgment.

Judge Mulligan in fact cited *Fox* v. *Capital* in his dissent from the panel decision later vacated by the court of appeals *en banc* (IBM App. K, p. 60a, n. 3). Moreover, before any contempt proceedings were filed, IBM was given further notice of these cases by the government's letter to the district court of June 20, 1973. (See Statement, *supra*, pp. 7-8.) In addition, as the court of appeals observed (II IBM App. I, pp. 170a-171a): "appellate jurisdiction cannot be conferred on a court of appeals by consent, *Stratton* v. *St. Louis South-*

3. Even if it were assumed that the rules of *Fox* v. *Capital* and *Doyle* v. *London Guarantee* might be reconsidered, the court of appeals properly held that it did not have jurisdiction to do so. Jurisdiction over any appealable orders and extraordinary applications under 28 U.S.C. 1651(a) in this government civil antitrust case lies, if at all, only in this Court under the Expediting Act, 15 U.S.C. 29. *Tidewater Oil Co.* v. *United States*, 409 U.S. 151. Moreover, since IBM has not appealed to this Court from the adjudication of civil contempt, no occasion is presented for this Court to reconsider the finality rule as applied to contempts in Expediting Act cases.

In *Tidewater* this Court held that "Congress enacted § 2 of the Expediting Act in 1903 to withdraw *all* intermediate appellate jurisdiction in Government civil antitrust cases" (409 U.S. at 154-155, emphasis by the Court). And, quoting from *United States* v. *California Cooperative Canneries* (279 U.S. 553, 558), the Court reaffirmed that "* * * *Congress limited the right of review to an appeal from the decree which disposed of all matters* * * *; and it precluded the possibility of an appeal to either* [*this Court or the court of appeals*] *from an interlocutory decree*" (409 U.S. at 160, emphasis by the Court). Thus under the Expediting Act appeal lies only to this Court, and then only after final judgment is entered. The same principle also applies with respect to pro-

---

*western Railway Co.*, 282 U.S. 10, 18 (1930), or by waiver, *United States* v. *Griffin*, 303 U.S. 226, 229." See *NAACP* v. *New York*, 413 U.S. 345, 353.

ceedings for civil contempt. *Terminal Railroad Association* v. *United States*, 266 U.S. 17; *United States* v. *American Society of Composers, Authors & Publishers*, 341 F. 2d 1003, 1007 (C.A. 2).[20]

IBM now argues, without citation of authority, that the present dispute involving the adjudication of contempt is "separate, different and distinct from the relief sought in the Government's antitrust case" and therefore the Expediting Act does not apply (Pet. 26). While a recognized exception to the Expediting Act does exist with respect to disputes arising out of government antitrust proceedings which have become essentially conflicts between private parties which are ancillary to the government's affirmative claims, and "outside the mainstream of the litigation in which the Government is directly concerned,"[21] the present controversy is obviously not of this character. First, the dispute is directly between IBM and the government, not private parties. Second, the process of discovery out of which the pretrial order and the resulting contempt order arose is essential to the ultimate trial of this action and is thus clearly with-

---

[20] See also *First Security Nat. Bank and Trust Co. of Lexington* v. *United States*, 382 U.S. 34, in which this Court reversed, on direct appeal, a civil contempt judgment against a defendant in a government antitrust case entered *after* the judgment in the main action became final.

[21] *Shenandoah Valley Broadcasting, Inc.* v. *American Society of Composers, Authors and Publishers*, 375 U.S. 39, 40; *United States* v. *Navajo Freight Lines, Inc.*, 339 F. Supp. 554, dismissed *sub nom. Garrett Freightlines, Inc.* v. *United States*, 405 U.S. 1035; *United States* v. *American Society of Composers, Authors and Publishers*, 341 F. 2d 1003, 1007 (C.A. 2).

in the "mainstream" of the government's litigation. Third, discovery of relevant documents goes to the heart of the government's antitrust case. Thus, there is no basis for an exception here from the explicit language in *Tidewater* with respect to the foreclosure of court of appeals jurisdiction in Expediting Act cases, and with respect to the rule of finality in such cases.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

LAWRENCE G. WALLACE,
*Acting Solicitor General.**

THOMAS E. KAUPER,
*Assistant Attorney General.*

HOWARD E. SHAPIRO,
JOHN B. WYSS,
*Attorneys.*

* In place of the Solicitor General, who is disqualified in this case.

APPENDIX A

CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza
New York, N. Y. 10005
212 HAnover 2-3000
International Telex: 620-976
Teletype: 710-561-0338
Telex: 1-25547

June 15, 1973

*U. S.* v. *IBM*

Dear Judge Edelstein:

Pursuant to my request yesterday afternoon Your Honor has set June 20, 1973, at 11:00 a.m., as the date for hearing my position with respect to the documents covered by Pretrial Order No. 5, and has asked me to put that position in writing no later than by the close of Monday, June 18. I want to convey my position to you just as quickly as possible and set it forth herewith.

The documents as to which a claim of attorney-client privilege was made and which are covered by Your Honor's Order are in my possession. I have, most respectfully, come to the conclusion that I am not required by the law to deliver the documents to the Government and should not do so. However, I am of course willing to have the documents reviewed pursuant to Special Master Order No. 1 to determine whether the documents contain matter protected by privilege.

Under the logic of Your Honor's ruling, should we deliver such documents to Government counsel such action might itself constitute a waiver of the privilege as well as render moot our present efforts in the Supreme Court to seek appellate review of that ruling. Even if Your Honor were to enter an order that such delivery would not itself constitute a waiver, we would not thereby be assured of protection in other courts. The District Court in St. Paul ordered such protection in the *Control Data* case but Your Honor's ruling has, in effect, rendered that protective provision null and void. Accordingly, under that reasoning (which we, of course, are contending was erroneous), IBM might not be protected in another case against a claim that delivery under Pretrial Order No. 5 was a waiver. Indeed, our knowledge of Your Honor's viewpoint could be interpreted as acquiescence, and therefore waiver, should we in compliance with your order deliver the documents to the Government.

The Government has suggested both in the Second Circuit and in its opposition to a stay in the Supreme Court that the only way to obtain appellate review is for a contempt citation to be entered. As you know we have sought to obtain appellate review on the merits by every other available means, and now have appellate proceedings pending in the Supreme Court. However, in some cases, as in the landmark case of *Hickman* v. *Taylor*, the only way to obtain appellate review is for counsel challenging the lawfulness of the order, with deference, to be placed in contempt

of court. And thus, most respectfully, I solicit your cooperation in issuing a contempt citation which will facilitate review of the Order.

Because of the importance of the attorney-client privilege to the administration of justice, the risk of irreparably depriving IBM of its claim of privilege and the risk of infecting other cases, I have respectfully concluded that I should not produce the documents unless and until it has been finally determined that they should be produced.

Respectfully,

/s/ Bruce Bromley
BRUCE BROMLEY

The Honorable David N. Edelstein,
Chief Judge,
United States District Court,
Southern District of New York,
United States Courthouse,
Foley Square,
New York, N. Y. 10007

K

Copy to Raymond M. Carlson, Esq.
Antitrust Division,
Department of Justice,
Washington, D. C. 20530

APPENDIX B

UNITED STATES DEPARTMENT OF JUSTICE
Washington, D. C. 20530

[Seal]

June 20, 1973

Address Reply to the
Division Indicated
and Refer to Initials and Number

TEK:BBW:RMC
60-235-38

Honorable David N. Edelstein
Chief Judge
United States District Court
Southern District of New York
New York, New York 10007

Re: United States v. International Business Machines Corporation, 69 Civ. 200

Dear Judge Edelstein:

On September 26, 1972, ruling upon the government's motion filed April 7, 1972, this Court entered Pretrial Order No. 5, directing defendant to produce for inspection and copying by the government certain documents heretofore produced to Control Data Corporation during the course of private litigation between that corporation and defendant. Attempts by defendant to secure reversal of this Court's order resulted in the entry of a number of stays of the order,

but on June 13, 1973, the Supreme Court denied defendant's most recent request for a further stay of this Court's order.

Counsel for defendant now assert, in their letter to this Court of June 15, 1973, that they are ". . . not required by law to deliver the documents to the government and should not do so . . . .".

This position is in direct contradiction to the provision of Pretrial Order No. 5, which orders that defendant "immediately deliver to plaintiff" the documents subject to the order. Defendant is thus in direct and deliberate defiance of this Court's order. Such conduct may result in yet another delay in the government's preparation of this case for trial.

On behalf of the public interest in the expeditious resolution of the issues presented by this case, the government urges that this Court direct immediate compliance with Pretrial Order No. 5 and further direct that the defendant deliver or cause to be delivered the documents subject to that order to the government's representatives by 12 o'clock Noon on Friday, June 29, 1973.

The Court has also requested that the government state its position in the event defendant continues to defy this Court's order. The sanctions available in this situation are set forth in the Federal Rules of Civil Procedure 37(d)(2).

Under subparts (A) and (B) of this Rule, the Court may order that the matters regarding which its order was made or any other designated facts be taken as established for the purposes of the action

or may make an order refusing to allow the disobedient party to support or oppose designated claims or defenses. However, inasmuch as the government has seen only one of these documents, the government presently has no basis upon which to recommend sanctions of this nature.

Under subpart (C) the Court may make an order striking out pleadings or parts thereof or rendering a judgment by default against the disobedient party. For the reasons set forth above, the government does not believe that an appropriate sanction presently can be recommended by it to strike parts of defendant's pleadings. And although the rendering of a default judgment has been held in this circuit to be an appropriate sanction in comparable circumstances, *cf. Trans World Airlines* v. *Hughes Tool Co.*, 449 F. 2d 51 (1971), *reversed on other grounds*, 409 U.S. 363 (1973), the magnitude of the public interest and other interests such as those of employees and stockholders which would be affected by such action here render the use of this sanction questionable without a determination on the merits of the government's charges of monopolization. The government does note, however, that a default judgment on the issue of liability would not preclude full proceedings upon the propriety of the relief prayed for in the government's memorandum of October 16, 1972.

Subpart (D) of Rule 37(b)(2) provides that, in lieu of making any of the foregoing orders or in addition thereto, the court may make an order treating as a contempt of court the failure to obey an

order directing discovery. In the government's view, an order holding defendant to be either in civil contempt or simultaneously in civil and criminal contempt would be appropriate sanctions in the present circumstances.

An order holding defendant to be in civil contempt would, in the government's view, expedite this litigation, now long delayed by defendant's refusal to produce the documents, and carry out the purposes of the federal discovery rules and the philosophy which underlies the Expediting Act, 15 U.S.C. § 28. Indeed, Section 4 of the Sherman Act, 15 U.S.C. § 4 directs the court before which any antitrust action is pending to ". . . proceed, as soon as may be, to the hearing and determination of the case . . . ." The coercive conditional sanction which attaches to a finding of civil contempt seems to the government to be the most likely route to an orderly and expeditious resolution of this matter.

We point out, moreover, that the conduct of defendant on the question of compliance with Pretrial Order No. 5 has been made well known to the Court; it has been open and defendant's intentions have been disclosed both to the government and to the Court in the letter of defendant's counsel to the Court dated June 15, 1973. While these reasons, the government believes, may militate against holding defendant in criminal contempt at this time, defendant's proposed conduct would be deliberate and willful, thereby rendering the sanction of criminal contempt appropriate.

With respect to sanctions for civil contempt, the government urges that, if defendant persists in its

defiance of this Court's order beyond the stated time for delivery of the documents, this Court should impose upon defendant a civil sanction, conditional in nature, requiring that defendant pay into the general treasury of the United States an amount equal to 5 percent of its daily earnings, based upon its 1972 net earnings, each day to be measured from midnight to midnight, provided that delivery of the documents as aforesaid before the close of business on any day shall effect a remission of the sanction for that day. In addition, this civil sanction should continue in effect until the documents are delivered to plaintiff or until the case is finally terminated and all appeals have been completed or the time for appeal has expired, whichever is sooner.

With respect to sanctions for criminal contempt should the Court elect to so proceed, the government is of the view that an appropriate fine to be imposed upon defendant would be $1 million.

The civil sanction described above is deemed the very minimum, considering the size and resources of the defendant to effect the prompt delivery of these documents, compliance with this Court's order and vindication of this Court's authority to issue and enforce such orders in this major antitrust case. The payment to the genreal treasury will compensate the public interest, at least in part, for the continued injury thereto caused by any further delay in compliance with Pretrial Order No. 5.

Since the conduct at issue here is that of the corporation through its agents, we believe that the cor-

poration, rather than any individual, is the appropriate respondent.

In its letter of June 15, defendant has indicated that one of its purposes in standing ready to accept a citation for contempt is its desire to test its contentions on appeal. For this reason, we believe it would also be appropriate for the Court, if it decides upon contempt as a sanction, to make specific findings of fact and conclusions of law concerning defendant's waiver of privilege and subsequent refusal to produce the documents. There appears, however, to be a distinction, not addressed in the letters and other papers filed in this Court by defendant, on the appealability of civil and criminal contempt proceedings. In *Fox* v. *Capitol Co.*, 299 U.S. 99 (1936), the Supreme Court noted that "the rule is settled . . . that except in connection with an appeal from a final judgment or decree, a party to a suit may not review upon appeal an order fining or imprisoning him for the commission of a civil contempt." This rule was noted in a dissenting opinion filed in the Court of Appeals upon defendant's attempted appeal from the entry of Pretrial Order No. 5. See *International Business Machines Corp.* v. *United States*, 471 F.2d 507, 517, 519 n. 3 (1972). On the other hand, "where a judgment of contempt is embodied in a single order which contains an admixture of criminal and civil elements, the criminal aspect of the order fixes its character for purposes of procedure on review." *Penfield Co.* v. *S.E.C.*, 330 U.S. 585 (1947). The rule appears to be that an appeal will lie from such a

judgment of both civil and criminal contempt. In the light of these authorities, the government's statement in its expedited opposition to IBM's motion in the Supreme Court for a stay, to the effect that an order adjudging IBM in civil contempt is appealable to that Court, was erroneous. We do not believe, however, that the question of appealability should enter into this Court's determination of an appropriate sanction. Rather, as indicated above, the sanction should turn on the policies of law to be vindicated. It would, therefore, be inappropriate for the government to object to any sanction this Court might impose to vindicate these policies solely on the ground further review might result.

In the event the Court should find defendant to be in criminal contempt, the government believes that proceedings in this Court must continue while any appellate review which defendant may invoke is carried out. Accordingly, although we believe the Court's order with respect to waiver of any privilege to be correct, it may well be that the documents being withheld by defendant are in fact of such a character that there is no privilege attached to them so as to be the subject of such a waiver. Therefore, the government suggests that if this Court holds the defendant to be in either civil or criminal contempt and if defendant invokes such appellate remedies as it may have, this Court should direct that documents which are the subject of Pretrial Order No. 5 be submitted to the Special Masters, together with other allegedly

privileged documents, for a determination of the question as to whether or not they were in fact privileged absent waiver.

Sincerely yours,

THOMAS E. KAUPER
Assistant Attorney General
Antitrust Division

By: /s/ Raymond M. Carlson
RAYMOND M. CARLSON
Attorney, Department of Justice

☆ U. S. GOVERNMENT PRINTING OFFICE: 1974 538058 287